

# THE UNITED STATES ARMED INTERVENTION IN GRENADA—IMPACT ON WORLD ORDER\*

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I.	THE EVENTS .....	397
II.	REACTION TO THE INVASION .....	401
	<i>A. At the United Nations</i> .....	401
	<i>B. At the Organization of American States</i> .....	402
	<i>C. Other Reactions</i> .....	402
III.	A PRELIMINARY LEGAL ANALYSIS .....	404
	<i>A. Rescue of U.S. Nationals</i> .....	405
	<i>B. Request by the Governor-General of Grenada</i> .....	411
	<i>C. U.S. Action in Support of a Regional Collective</i> <i>Security Arrangement</i> .....	414
	1. <i>The OECS Treaty Provisions</i> .....	416
	2. <i>Prohibition Against the Use of Force</i> .....	417
	<i>a. Article 2(4) of the UN Charter</i> .....	417
	<i>b. Pertinent Provisions of the OAS Charter and</i> <i>the Rio Treaty</i> .....	418
	<i>c. U.S.-OECS Action as a Self Defense</i> <i>Measure Under Article 51</i> .....	420
	3. <i>U.S.-OECS Intervention as a Regional</i> <i>Peacekeeping Action</i> .....	421
IV.	APPRAISAL AND RECOMMENDATION .....	423

\* I am grateful to my colleagues William Beaney, Paul Dempsey, George Pring and Lawrence Tiffany for their thoughtful comments on a preliminary draft of this manuscript. The article was completed in December 1983. I have attempted to update it by referring to official documents and the legal literature on the subject available as of spring 1984 without making extensive changes in the December 1983 draft. The following sources were used to update the article: GRENADA: A PRELIMINARY REPORT (Dep't of State & Dep't of Defense, Dec. 16, 1983); *The United States Action in Grenada*, 78 AM. J. INT'L L. 131-175, 200-204 (1984) (Articles by Joyner and Moore, Comments by Vagts and Boyle et.al., and Statement by Dam); A.B.A. Section of International Law and Practice, *Report of the Committee on Grenada* (Feb. 10, 1984); and *Comments on U.S. Intervention in Grenada*, 25 INT'L PRACTITIONER'S NOTEBOOK 19-26 (Jan. 1984) (Comments by Rubin, Nanda, and Boyle et. al. and Address by Dam).

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The United States-led armed intervention in Grenada took place on October 25, 1983,<sup>1</sup> and met with an immediate reaction of disapproval, even by European allies of the United States. The British government expressed its "misgivings" on October 24 when informed of the pending action.<sup>2</sup> Affirming the legal principle of nonintervention, France described the invasion as a "surprising action in relation to international law."<sup>3</sup> Government officials of Canada,<sup>4</sup> Italy,<sup>5</sup> and West Germany<sup>6</sup> expressed similar reservations. Most Latin American countries were also critical.<sup>7</sup> At home, U.S. congressional reaction was mixed.<sup>8</sup>

At meetings of the Organization of American States<sup>9</sup> and the United Nations Security Council,<sup>10</sup> many speakers condemned the invasion, and questions about the propriety under international law of the use of force to accomplish political objectives were raised in the Council of Europe.<sup>11</sup> However, as the invading forces accomplished their military objectives within three days<sup>12</sup> and a withdrawal of troops from the island began within two weeks,<sup>13</sup> the invasion of Grenada, indeed Grenada itself, was no longer in the

1. See *Assault Force Spearheaded by U.S. Troops Invades Grenada and Seizes Both Airports*, N.Y. Times, Oct. 26, 1983, at A1, col. 1.

2. See Feder, *U.S. Was Warned by Mrs. Thatcher*, N.Y. Times, Oct. 26, 1983, at A1, col. 4.

3. *Id.*

4. See Tuohy, *Britain Softens Criticism; Other Allies Opposed*, L.A. Times, Oct. 27, 1983, Pt. I, at 12, col. 3.

5. See Gwertzman, *Allies' Criticism of U.S. Raises Wider Questions*, N.Y. Times, Oct. 27, 1983, at A21, col. 1.

6. *Id.* at col. 2; N.Y. Times, Oct. 29, 1983, at 7, col. 6.

7. See Weinraub, *Key O.A.S. Nations Oppose Invasion*, N.Y. Times, Oct. 26, 1983, at 7, col. 1; Shabecoff, *Most O.A.S. Members Assail Action*, N.Y. Times, Oct. 27, 1983, at 5, col. 1.

8. See Roberts, *Capitol Hill is Sharply Split Over the Wisdom of Invading Grenada*, N.Y. Times, Oct. 26, 1983, at 9, col. 1; Houston and Tumulty, *Congressional Reaction Mixed*, L.A. Times, Oct. 26, 1983, Pt. 1, at 16, col. 4.

9. See Weinraub, *supra* note 7.

10. See Bernstein, *Grenada Debate Continues in U.N.*, N.Y. Times, Oct. 27, 1983, at A19, col. 1; Bernstein, *U.S. Vetoes U.N. Resolution 'Deploing' Grenada Invasion*, N.Y. Times, Oct. 29, 1983, at 1, col. 4; Wizinizer, *UN Debates Invasion of Grenada*, C.S. Monitor, Oct. 27, 1983, at 10, col. 3.

11. See Gwertzman, *supra* note 5, at col. 2; Editorial, *Fair-Weather Allies*, U.S. Journal, Oct. 27, 1983, at 26, col. 1.

12. See Feron, *U.S. Reports Gains in Grenada, But New Resistance is Feared*, N.Y. Times, Oct. 29, 1983, at 1, cols. 3, 6; GRENADA—A PRELIMINARY REPORT, Dec. 16, 1983, at 1 (Dep't of State and Dep't of Defense, Washington, D.C.) [hereinafter cited as GRENADA REP.].

13. See, e.g., Montalbano, *Grenada Pullout Due in Few Days*, L.A. Times, Nov. 3, 1983, Pt. 1, at 1, col. 5.

spotlight.<sup>14</sup> It seems likely that the episode will be remembered at best as a footnote in the history books.

For several reasons the eventual criticism of the United States' action, within and outside the United States, was muted. First, the invading forces struck fast and decisively, crushing the initial resistance and taking over the island with a minimum cost in lives and property.<sup>15</sup> This was accomplished because the Revolutionary Military Council (RMC), which had taken over on October 19,<sup>16</sup> received no external military assistance except for the help of the Cubans already on the island.<sup>17</sup> Second, the population of Grenada responded favorably, indeed enthusiastically, to the invasion.<sup>18</sup> Subsequent events in Grenada, such as the withdrawal of the occupying troops and the formation of an interim government,<sup>19</sup> were perhaps additionally responsible for a modification of the positions taken by erstwhile critics. It remains essential, however, that the legal implications of an event of this kind be analyzed in order to assess the possible long-range impact of such an intervention on world public order. Consequently, a preliminary legal appraisal of the action will be undertaken here.

## I. THE EVENTS

On October 25, 1983, United States Marines and Army Rangers landed in Grenada.<sup>20</sup> Assisting the United States assault force of nearly 1,900 troops were 300 soldiers from six Caribbean States—Barbados, Jamaica, and four member States of the Organization of Eastern Caribbean States (OECS): Antigua, Dominica, St. Lucia, and St. Vincent.<sup>21</sup> When he announced the landing of U.S. and Caribbean troops on Grenada, President Reagan said that the United States "had no choice but to act strongly and deci-

14. See Ricks, *Grenada Slips Back to Its Usual Torpor After U.S. 'Rescue'*, Wall St. J., Nov. 8, 1983, at 1, col. 4.

15. For a report on casualties, see GRENADA REP., *supra* note 12, at 1.

16. See *id.* at 36.

17. See, e.g., *id.*, at 1; Kaufman, *Grenada Troops Pressing Battle Around Capital*, N.Y. Times, Oct. 27, 1983, at 1, col. 5.

18. See, e.g., Voman, *Grenadians Welcome U.S. Troops and Aid*, C.S. Monitor, Nov. 3, 1983, at 9, col. A1; Clymer, *Grenadians Welcomed Invasion, a Poll Finds*, N.Y. Times, Nov. 6, 1983, § 1, at 11, col. 1; L.A. Times, Nov. 6, 1983, Pt. I, at 1, col. 1.

19. See, e.g., GRENADA REP., *supra* note 12, at 1; Kaufman, *Nine Grenadians Appointed to Serve on a Ruling Panel*, N.Y. Times, Nov. 10, 1983, at 8, col. 1.

20. See N.Y. Times *supra* note 1, at col. 6.

21. *Id.*

sively.”<sup>22</sup> The President said that the action was taken in response to “an urgent, formal request” from the five-member OECS “to assist in a joint effort to restore order and democracy” on Grenada.<sup>23</sup>

The invasion force, which grew to 7,000 by further landings, met little resistance and succeeded in just three days in securing “all significant military objectives . . . including the two airports, the campuses of the St. George’s University School of Medicine, the Governor-General’s residence, the radio and power stations, Forts Frederick and Rupert, and the Richmond Hill prison.”<sup>24</sup> Within a week, the remaining pockets of resistance were eliminated.<sup>25</sup> United States casualties included 18 killed and 116 wounded in action, while 45 Grenadian civilians were killed and 337 wounded. Cuban casualties included 24 killed in action and 59 wounded.<sup>26</sup> The U.S. forces began withdrawing from the island in early November.<sup>27</sup> The last 950 U.S. Combat troops left Grenada in mid-December, seven weeks after the invasion.<sup>28</sup>

On November 3, Sir Paul Scoon, the Queen’s representative and the only civilian authority on the island, announced that he would appoint a broad-based nonpolitical interim government, and expressed hope that elections to form a government would take place within six months.<sup>29</sup> An interim governing council was appointed on November 9 and sworn in on November 15.<sup>30</sup> The Council promised to hold elections “as soon as practical,” and the council’s legal adviser announced that a state of emergency imposed in Grenada after the U.S. invasion had been lifted.<sup>31</sup> The Council established an Advisory Tribunal to review the cases of

22. *Situation in Grenada*, 19 WEEKLY. COMP. PRES. DOCS., No. 43, Oct. 31, 1983, at 1487.

23. *Id.*

24. GRENADA REP., *supra* note 12, at 1.

25. See, e.g., Feron, *U.S. Troops Patrol as Grenada Edges Closer to Normal*, N.Y. Times, Oct. 31, 1983, at 1, col. 6.

26. GRENADA REP., *supra* note 12, at 1.

27. See, e.g., N.Y. Times, Nov. 4, 1983, at A7, col. 2, for the statement by U.S. Ambassador to Grenada, Charles A. Gillespie, that the number had “already been cut down to around 3,000.”

28. See, e.g., Mydans, *Last Americans in Combat Role Leave Grenada*, N.Y. Times, Dec. 16, 1983, at 1, col. 2; Editorial, *Remember Grenada?*, N.Y. Times, Dec. 15, 1983, at 24, col. 1; GRENADA REP., *supra* note 12, at 1.

29. See Kaufman, *New Government For Grenada Due Early Next Week*, N.Y. Times, Nov. 4, 1983, at A1, col. 4. See also Feron, *Grenadian Aide of U.N. Says He Will Form an Interim Government*, N.Y. Times, Nov. 7, 1983, at 8, col. 1.

30. See Kaufman, *supra* note 19; Shribman, *Grenadians Form a Ruling Council*, N.Y. Times, Nov. 16, 1983, at A4, col. 3.

31. Shribman, *supra* note 30.

persons under detention and, after reviewing these cases, the tribunal decided that 39 prisoners should continue in detention.<sup>32</sup> Following the invasion, Grenada began receiving foreign economic assistance, the bulk of which was provided by the United States.<sup>33</sup>

It is necessary, however, to place these events in an historical context for a deeper understanding of the political and ideological forces which lay at the root of the eventual intervention in Grenada.<sup>34</sup> On February 7, 1974, Grenada gained independence from British rule. Sir Eric Gary, a corrupt and eccentric prime minister, stayed in power. The opposition to his regime was led by the New Jewel Movement (NJM), which had been formed in March 1973 by the merger of two political organizations in Grenada. In the 1976 general elections, the NJM became the principal political opposition, receiving 48% of the vote while Sir Eric continued as Prime Minister. On March 13, 1979, the NJM staged a successful coup d'état with little resistance and Maurice Bishop became Prime Minister of a new People's Revolutionary Government (PRG) in Grenada. Within two weeks, Bishop suspended the 1974 Constitution and subsequently proclaimed several "People's Laws." The original blend of Marxism with Tanzanian and West Indian nationalistic philosophies was supplemented by closer ties to Cuba and the Soviet Union. The NJM entered into agreements with the Communist parties of the Soviet Union and Cuba aimed at building a strong party on Marxist-Leninist principles and for the training of Grenadians toward that end. Grenada thereafter entered into a number of economic, political and military agreements with the Soviet-bloc nations, and built a strong military force, comprised of a regular army of 600 supplemented by a militia estimated at around 2,500 members which reportedly "dwarfed those of its OECS neighbors."<sup>35</sup> The Grenadian People's Revolutionary Army (PRA) was equipped by Cuba, the Soviet Union, and several Soviet-bloc nations. The Cuban presence in Grenada on October 25 consisted of 784 Cubans—construction workers, military and security personnel, advisers, and diplomats.<sup>36</sup>

The critical events which eventually led to the invasion of Gre-

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32. Grenada Collective Action, GIST, Jan., 1984, at 2 (Bureau of Public Affairs, U.S. Dep't of State).

33. *Id.*

34. See generally GRENADA REP., *supra* note 12; Massing, *Grenada Before and After*, THE ATLANTIC, Feb., 1984, at 76; Naipaul, *An Island Betrayed*, HARPER'S, Mar., 1984, at 61.

35. GRENADA REP., *supra* note 12, at 18.

36. See *id.* at 27.

nada began unfolding in late summer and early fall of 1983. There was growing discord in the NJM, and in mid-September the central committee of the Movement decided at an extraordinary meeting that leadership be shared between Prime Minister Bishop and Deputy Prime Minister Bernard Coard. Bishop was criticized for not having taken responsibility, not having "given the necessary guidance, [being] disorganized very often, [and avoiding] responsibilities for critical areas of work . . . ." <sup>37</sup> During the next month, there were reportedly strikes and demonstrations, as well as widespread confusion and suspicion. <sup>38</sup>

On October 12, Bishop challenged the idea of sharing power with Coard, but lost in the Central Committee which "apparently voted to place him under house arrest." <sup>39</sup> Two days later he was informed of this expulsion from the party and was placed under house arrest. Coard succeeded Bishop as Prime Minister. In a public statement on October 17, General Hudson Austin, Commander of the PRA, stated publicly on behalf of the NJM:

Sisters and brothers, over the past four-and-a-half years, the Central Committee has struggled very hard to win Comrade Bishop to a position of collective leadership. Comrade Bishop was hoping to use the masses' love for him and violate the principled stand by the Central Committee of the party . . . . Even with all the love and admiration which exists within our party for Comrade Maurice, the entire membership, except for a tiny minority, fully support the position of the Central Committee . . . . Comrade Bishop is at home and he is quite safe. <sup>40</sup>

The next day, five ministers in Bishop's cabinet resigned. On October 29, a crowd led by External Affairs Minister Unison Whiteman freed Bishop and proceeded to Fort Rupert. Bishop took over the Fort while the crowd disarmed the garrison. In a few hours, PRA troops captured Bishop, as well as three of his ministers and two union leaders, brought them into the Fort's courtyard and executed them.

Subsequent events included the formation of a Revolutionary Military Council (RMC) headed by General Austin, an official proclamation of a round-the-clock, shoot-on-sight curfew, more arrests, the closing of the Pearls Airport, and the cancellation of

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37. *Id.* at 32.

38. *Id.* at 34.

39. *Id.* at 35. See also Thomas, *From a Grenadian Diplomat: How Party Wrangle Led to Premier's Death*, N.Y. Times, Oct. 30, 1983, § 1, at 14, col. 1.

40. GRENADA REP., *supra* note 12, at 35.

flights. During the next five days there was disorder in Grenada. International journalists and diplomats were not permitted entry into the country. However, on October 22, two U.S. diplomats from Barbados arrived on a charter flight to discuss evacuation of U.S. nationals. Two more U.S. diplomats arrived by another charter flight on October 23. The Grenadian authorities denied that there was any need for evacuation. On October 24, a few small planes were allowed to land and depart, but the airport was not open to normal traffic. The invasion occurred the next day.

## II. REACTION TO THE INVASION

### A. *At the United Nations*

In the UN Security Council debate on the issue, the invasion was condemned "with varying degrees of harshness" by most of the speakers, and defended only by a small number of Caribbean States.<sup>41</sup> On October 28, the Council approved a resolution deploring the invasion by an overwhelming vote of eleven in favor, one (the United States) against, and three (Britain, Togo, and Zaire) abstaining.<sup>42</sup> The resolution, vetoed by the United States, stated that the Security Council "deeply deplores the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State."<sup>43</sup> The Resolution also called for "an immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops from Grenada."<sup>44</sup> Subsequently, on November 2, the UN General Assembly adopted a resolution virtually identical to the Security Council Resolution of October 28 by a recorded vote of 108 in favor to nine against, with twenty-seven abstentions.<sup>45</sup> In a separate recorded vote of seventy-one in favor to twenty-three against, with forty-one absentions, the Assembly approved a Belgian amendment, calling for free elections in Grenada "as rapidly as possible to choose its government democratically."<sup>46</sup>

During the Assembly debate,<sup>47</sup> delegates from Antigua and

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41. See Bernstein, *U.S. Vetoes U.N. Resolution 'Deploring' Grenada Invasion*, N.Y. Times, Oct. 29, 1983, at 1, col. 4.

42. *Id.*

43. Operative paragraph 1 of the Resolution. The text is reprinted in N.Y. Times, Oct. 29, 1983, at 4, col. 3.

44. *Id.* at operative paragraph 4.

45. See 21 UN MONTHLY CHRON., No. 1, Jan., 1984, at 4.

46. *Id.*

47. For a summary record, see *id.* at 5-7.

Barbuda, Barbados, St. Lucia, and the United States defended the use of force in Grenada. The U.S. representative said that the military intervention had been undertaken "in service of values of [the UN] Charter."<sup>48</sup> Among the severest critics were Cuba and the Soviet Union. Cuba described the U.S. action as "the latest example of the brutal interventions of the United States marines in the Caribbean and Latin America,"<sup>49</sup> and the USSR criticized the United States as "having committed aggression against a small, non-aligned country, in gross violation of Charter principles, posing a serious threat to international peace and security."<sup>50</sup>

On November 6, 1983, the UN Secretary-General reported that he had sent Diego Cordovez, Under Secretary General for Special Political Affairs, to Grenada where he held a number of consultations during his stay.<sup>51</sup> Among the items discussed were the multi-national force established by the OECS (numbering about 300 and supported by a U.S. Task Force on land and offshore), withdrawal of the U.S. combat forces, formation of an Advisory Council by Governor-General Sir Paul Scoon and preparations for general elections.<sup>52</sup>

### *B. At the Organization of American States*

On the day following the intervention, the Permanent Council of the Organization of American States met in an extraordinary session.<sup>53</sup> At that session, representatives of several Latin American States, including Colombia and Argentina, criticized the action in Grenada on the ground that it was in violation of the principle of nonintervention as embodied in the OAS Charter.

### *C. Other Reactions*

Among the Caribbean countries, the Bahamas, Belize, Guyana, and Trinidad and Tobago were opposed to the U.S.-led intervention.<sup>54</sup> In early November, Guyana's president, Linden

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48. *Id.* at 7.

49. *Id.* at 6.

50. *Id.* at 7.

51. U.N. Doc. A/38/568, Nov. 6, 1983. For a summary of the report, see 21 UN MONTHLY CHRON., No. 1, Jan., 1984, at 4-5.

52. *Id.*

53. For a transcript, see OEA/Ser. G, Doc. CP/ACTA 543/83 (1983).

54. See Meiscilin, *Grenada Invasion Creates Rifts in the Caribbean*, N.Y. Times, Nov. 13, 1983, § 1, at 10, col. 1; Volman, *A Grenada Casualty: Caribbean Unity*, C.S. Monitor, Nov. 4, 1983, at 10, col. 1.



Forbes Burnham, whose left-wing government had the friendliest ties to Maurice Bishop's government in Grenada, rejected the rationale for action by the United States and other OECS States. The President's rationale was that the United States had acted because its security was threatened by Cuba's involvement in Grenada. Burnham said that the threat was "that if the Grenadians succeeded in transforming their economy, other countries . . . might say that this ideology or that economic tactic on the part of Grenada must be good. There's nothing in international law that says that's a good reason for invading."<sup>55</sup>

The rift between the Caribbean countries which took part in the invasion and those which opposed it reportedly threatened the regional organization for the English-speaking countries in the Caribbean, the Caribbean Community.<sup>56</sup> Subsequently, however, Trinidad and Tobago agreed to take part in a plan for a Commonwealth security force for Grenada, which according to the Commonwealth Secretariat, was to be "a policing rather than a peacekeeping body and its members [were] to be drawn from national police forces."<sup>57</sup>

Despite the earlier expressions of disapproval of the United States' action by its allies, the subsequent U.S. diplomatic efforts to explain the invasion were partially successful.<sup>58</sup> Thus, in November, British, French, and German officials halted their criticism of the U.S. action, instead turning their attention toward providing international aid for the reconstruction of Grenada.<sup>59</sup> For the November meeting of the OAS General Assembly, the United States pushed hard to explain its position in Latin American capitals.<sup>60</sup> The Declaration adopted at the Commonwealth Conference in New Delhi on November 29, stated that it was a time for "recon-

55. See Meiscilin, C.S. Monitor, Nov. 13, 1983, at 10, col. 3.

56. *Id.* The text of the 1973 Treaty is reprinted in 12 INT'L LEGAL MATERIALS 1033 (1973). For the text of the provisions on the Caribbean Common Market, see *id.* at 1044. For a comment, see Simmonds, *The Caribbean Economic Community: A New Venture in Regional Integration*, 23 INT'L & COMP. L. Q. 453 (1974).

57. N.Y. Times, Nov. 4, 1983, at A17, col. 2.

58. See Vinocur, *Invasion of Grenada Wins Allied Backers After Initial Dissent*, N.Y. Times, Nov. 3, 1983, at 1, col. 6; 13, col. 1.

59. See, e.g., Marshall, *Thatcher, Kohl End Their Grenada Action Criticism*, L.A. Times, Nov. 10, 1983, Pt. 1, at 1, col. 4; Saikowski, *Reagan Soothes Allies Over Grenada Move*, C.S. Monitor, Nov. 4, 1983, at 3, col. 1.

60. See, e.g., Smith, *U.S. Hoping to Steer Clear of O.A.S. Condemnation*, N.Y. Times, Nov. 13, 1983, § 1, at 10, col. 1.

struction, not recrimination" in Grenada.<sup>61</sup> This coincided with Britain's announcement a day earlier that it had decided on an immediate grant of more than \$1 million toward the restoration of civilian government in Grenada.<sup>62</sup> Earlier, on November 17, the European Parliament adopted a resolution calling for international emergency aid for Grenada, criticizing the United States-led invasion.<sup>63</sup>

### III. A PRELIMINARY LEGAL ANALYSIS

On October 25, the day of the U.S.-led intervention in Grenada, President Reagan justified the United States action on three grounds: (1) to protect the lives of United States nationals, (2) "to forestall further chaos," and (3) "to assist in the restoration of conditions of law and order and of governmental institutions on the island of Grenada, where a brutal group of leftist thugs violently seized power, killing the Prime Minister, three Cabinet members, two labor leaders, and other civilians, including children."<sup>64</sup> Thus, the President said, the U.S. objectives were clear: "to protect our own citizens, to facilitate the evacuation of those who want to leave, and to help in the restoration of democratic institutions in Grenada."<sup>65</sup>

Subsequently, in their remarks on the U.S. intervention, several U.S. government officials, including Secretary of State George Shultz,<sup>66</sup> Deputy Secretary of State Kenneth Dam,<sup>67</sup> and U.S. Permanent Representative at the United Nations Jean Kirkpatrick,<sup>68</sup> argued that the U.S. action was valid under international law. In addition, Assistant Secretary of State for Human Rights and Humanitarian Affairs Elliot Abrams offered a moral and ethical perspective, justifying the U.S. action by invoking human rights.<sup>69</sup>

61. Stevens, *Commonwealth Cautious on Grenada*, N.Y. Times, Nov. 30, 1983, at A3, col. 4.

62. See Apple Jr., *Britain Gives Grenada \$1 Million Grant*, N.Y. Times, Nov. 29, 1983, at A3, col. 4. See also N.Y. Times, Nov. 18, 1983, at 6, col. 1.

63. See also *id.*, Nov. 18, 1983, at 6, col. 1.

64. See *Situation in Grenada*, 10 WEEKLY COMP. PRES. DOC., No. 43, Oct. 31, 1983, at 1487.

65. *Id.*

66. For a text of Secretary Shultz's news conference on October 25, 1983, see 83 DEP'T ST. BULL., No. 2081, DEC., 1983, at 69-72.

67. See *id.* at 79-82; 78 AM. J. INT'L L. 200 (1984).

68. 83 DEP'T ST. BULL., No. 2081, Dec., 1983, at 74-77.

69. Abrams, *Human Rights Implications for U.S. Action in Grenada*, 84 DEP'T ST. BULL. No. 2083, Feb., 1984, at 24.

The legal grounds on which the U.S. intervention was justified broadly follow the ones earlier presented by President Reagan: (1) rescue of U.S. nationals; (2) request by the Governor General of Grenada, Sir Paul Scoon; and (3) collective action by the OECS. The legal issues presented by each of these justifications will be examined here.

### *A. Rescue of U.S. Nationals*

The Reagan administration consistently argued that its intervention in Grenada was justified, in part, on humanitarian grounds. Following President Reagan's invocation of the doctrine of humanitarian intervention,<sup>70</sup> other Government officials, including Secretary of State Shultz, Ambassador Middendorf, Ambassador Kirkpatrick, and Deputy Secretary of State Dam, relied on humanitarian intervention to justify the United States action. Their statements at the United Nations, the Organization of American States, and in other public fora will be examined here for the thrust of their arguments.

In his news conference on October 25, Secretary Schultz asserted that one of the reasons for the President's decision to commit U.S. forces in Grenada was "[t]o secure the safety of American citizens—and, for that matter, the citizens of other countries—and to assure that any who wish to leave may do so."<sup>71</sup> The next day, at a meeting of the OAS Permanent Council, Ambassador Middendorf expressed the "particularly humanitarian concern" of the United States in the following words:

The deteriorating conditions on the island posed a threat to the continued safety of U.S. citizens there, who number 800-1,000, largely consisting of medical school students and faculty. There is substantial precedent for military action to ensure the safety of foreign nationals in such conditions of disorder. While there have been no specific threats against U.S. citizens, a number had sought to flee, even in the absence of organized evacuation efforts, at great risk. The military council on the island had promised to reopen the airport on October 24 but did not do so, thus heightening concern over the continued welfare of these citizens. The lack of respect for human rights and the degenerating conditions, of course, also posed a threat to other foreign nationals,

70. For President Reagan's remarks of October 25 and 27, see 83 DEP'T ST. BULL. *supra* note 68, at 67, 78.

71. *Id.* at 69.

and, indeed, to the people of Grenada.<sup>72</sup>

The U.S. Permanent Representative at the United Nations, Ambassador Kirkpatrick, made similar statements at sessions of the United Nations Security Council and the United Nations General Assembly. On October 27, at the Security Council, the ambassador drew a parallel to revolutionary violence in Iran, asserting that the United States "could not be expected to sit idly by while the lives of our citizens were again threatened."<sup>73</sup> Clarifying the United States' position, she said that "the United States does not advocate that in normal circumstances concern for the safety of a State's nationals in a foreign country may justify military measures against that country."<sup>74</sup> Kirkpatrick added, however:

But normal circumstances presuppose the existence of a government which, regardless of the democratic, nondemocratic, or antidemocratic nature of the system which it pursues, is nevertheless recognized as minimally responsible for not wantonly endangering the lives of its citizens, foreign nationals, and the security of neighboring States in the region. Where, however, terrorists murder the leading citizenry and leadership of their own country, a situation may well arise whereby no new government replaces the former order but anarchy prevails. In these circumstances, the general rule of international law permits military action for protecting endangered nationals. Such was the situation in Grenada.<sup>75</sup>

On November 2, addressing a session of the UN General Assembly, the Ambassador reiterated that "the use of force by the task force was lawful under international law and the UN Charter, because it was undertaken to protect American nationals from a clear and present danger . . . ."<sup>76</sup>

Finally, remarks of Kenneth Dam, Deputy Secretary of State, on November 4 present the clearest legal brief for the United States position:

U.S. action to secure and evacuate endangered U.S. citizens on the island was undertaken in accordance with well-established principles of international law regarding the protection of one's nationals. That the circumstances warranted this action has been amply documented by the returning students themselves. There is absolutely no requirement of international law that compelled

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72. *Id.* at 73.

73. *Id.* at 75.

74. *Id.*

75. *Id.*

76. *Id.* at 77.

the United States to await further deterioration of the situation that would have jeopardized a successful operation. Nor was the United States required to await actual violence against U.S. citizens before rescuing them from the anarchic and threatening conditions the students themselves have described.<sup>77</sup>

It is unquestionable that under traditional international law States asserted their right to intervene militarily to protect their nationals on humanitarian grounds. There is room for argument, however, as to whether the claimed right was a narrow one, limited to the protection of one's own nationals, or whether it was to be extended to the protection of other State's nationals, or under certain circumstances even to the nationals of the State against which military intervention was undertaken as well.<sup>78</sup> As Phillip Jessup succinctly summarized the traditional approach, the right of the State "to employ its armed forces for the protection of the lives and property of its nationals abroad in situations where the State of their residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection to which they are entitled"<sup>79</sup> was recognized under international law.

The opponents of the doctrine claim that humanitarian intervention was occasionally abused during the 19th century and, by 1945, had fallen into disuse.<sup>80</sup> They would reject the validity of the doctrine in the post-UN era by invoking article 2(4) of the UN Charter which bars member nations "in their international rela-

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77. *Id.* at 81.

78. See generally HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973), and the authorities cited at 229-234; Behuniak, *The Law of the Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978); Brownlie, *Humanitarian Intervention*, in LAW AND THE CIVIL WAR IN THE MODERN WORLD 217 (1974); Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND THE CIVIL WAR IN THE MODERN WORLD 229 (1974); Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29 (1980); Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CALIF. W. INT'L L.J. 203 (1974) [hereinafter cited as Fonteyne]; Nanda, *Humanitarian Military Intervention*, 23 World View, No. 10, Oct. 1978, at 23; Suzuki, *A State's Provisional Competence to Protect Human Rights in a Foreign State*, 15 TEXAS INT'L L.J. 231 (1980).

79. P. JESSUP, A MODERN LAW OF NATIONS 169 (1959).

80. See generally I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 55-111, 216-50 (1963). But see Fonteyne, *supra* note 78, at 205-234 for his discussion of the State practice on humanitarian intervention. Fonteyne concludes that "while divergences certainly existed as to the *circumstances* in which resort could be had to the institution of humanitarian intervention, as well as to the *manner* in which such operations were to be conducted, the *principle* itself was widely, if not unanimously, accepted as an integral part of customary international law." *Id.* at 235.

tions from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.” This prohibition, however, is to be read in conjunction with article 2(7) of the Charter which forbids intervention by the UN in matters which are essentially within the domestic jurisdiction of any State, and with article 51 of the Charter, which recognizes the “inherent right” of self-defense against “armed attack.”

Equally pertinent are articles 18 and 20 of the Charter of the Organization of American States.<sup>81</sup> Article 18 provides that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Article 20 is unequivocal in its prohibition on intervention as it states that:

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, *on any grounds whatever*<sup>82</sup>

While there is sharp disagreement among scholars on both the textual and contextual interpretations of the UN Charter provisions, the opponents strongly object to any legitimization of humanitarian intervention, invoking not only pertinent legal norms but also policy considerations.<sup>83</sup> They insist that the doctrine is unacceptable on legal grounds for it violates the cardinal principles of sovereign equality, political independence and territorial integrity. In addition, they object to it on policy grounds, arguing that the doctrine suffers from lack of precision and can be easily manipulated by powerful States to impose their will on weak, usually Third World nations, especially since the world community suffers from the absence of an objective fact-finding body and effective in-

81. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (*entered into force for the U.S.*, Dec. 13, 1951) *as amended by* Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (*entered into force for the U.S.*, Feb 27, 1970).

82. *Id.* (emphasis added).

83. See, e.g., Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 78, at 139, 145-46.

ternational machinery to supervise and monitor humanitarian intervention operations.

Proponents of humanitarian intervention would argue that human rights issues are no longer a matter of exclusively internal concern and would invoke the UN Charter, which in its Preamble expresses the determination of the peoples of the world "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person" and a commitment "to ensure by the acceptance of principles and the institutions of methods, that armed force shall not be used, save in the common interest." They would argue that this common interest certainly includes humanitarian action, for articles 1 and 55 of the UN Charter reaffirm the United Nations' commitment to promoting universal respect for an observance of human rights and fundamental freedoms for all, and article 56 states that the article 55 commitment has a positive obligation for action by member States in defense of human rights.<sup>84</sup>

While the debate continues, there is as yet no consensus in sight on the definition of humanitarian intervention, the set of criteria used to judge its permissibility or impermissibility under international law, or the safeguards necessary to prevent abuse of the doctrine.<sup>85</sup> However, it is certain that a customary right to protect one's nationals has survived in the post-Charter area, and armed action still must meet two prerequisites to be justified under international law: (1) that there is present an imminent danger to human lives, indicating an overwhelming necessity for prompt action; and (2) that the armed force used in undertaking such action is proportional to the demands of the crisis.<sup>86</sup> The test was appropriately articulated by the U.S. representative during the UN Security Council debate on the Entebbe rescue mission, when, in justifying the temporary breach of Uganda's territorial integrity by Israel, he said that:

There is a well established right to use limited force for the protection of one's own nationals from the imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right

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84. Article 56 states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the Purposes set forth in Article 55."

85. For various views, see *supra* notes 78, 80.

86. For a general analysis of the twin criteria of necessity and proportionality under customary international law as the requirements of self-defense, see M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 217-44 (1961).

. . . is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.<sup>87</sup>

The application of this test in the Grenada case faces no conceptual or practical problems. The uncontroverted pertinent facts are that the rescue mission of the U.S. medical students was completed within a few days after the U.S.-led forces landed in Grenada, although the U.S. forces remained on the island long after U.S. nationals had been evacuated.<sup>88</sup> On two other factual issues, however, there is some controversy. One pertains to the nature of the threat to U.S. nationals, that is, whether it was imminent. The other relates to the airport operations out of Grenada on October 24, that is, whether American medical students were free to leave Grenada if they wished to do so.<sup>89</sup>

To illustrate, Charles S. Modica, Chancellor of the St. George's University School of Medicine, stated at a news conference on October 25 that the safety of the students had been assured by Grenada's military rulers and, in his opinion, "the President ha[d] taken some very unnecessary action in view of the fact that those students could have been lifted out of there today and tomorrow with arrangements we had made with the U.S. Embassy and the Canadian authorities."<sup>90</sup> The next day, saying that the State Department had convinced him that he was wrong, the Chancellor changed his mind.<sup>91</sup> Following a House delegation's fact-finding trip to Grenada in early November, one delegation member, Michael B. Davies, said that "either the American citizens in Grenada were in danger or they sure had a reasonable basis to believe they were."<sup>92</sup> Two others, Louis Stokes and Ronald V. Delums, disputed the contention that U.S. citizens in Grenada were in real danger.<sup>93</sup> Also, on October 24, several charter flights had reportedly left Grenada, and "normal airport routines in operation"

87. U.N. Doc. S/P.V. 1941 (1976).

88. Although the rescue mission was completed within the first three days, the last combat troops stayed on the island for two and a half months longer, withdrawing in mid-December. Mydans, *supra* note 28.

89. See, e.g., Bourne, *Was the U.S. Invasion Necessary?*, L.A. Times, Nov. 6, 1983, Pt. IV, at 1, col. 1.

90. McQuiston, *School's Chancellor Says Invasion Was Not Necessary to Save Lives*, N.Y. Times, Oct. 26, 1983, at A20, col. 5.

91. McManus, *Chancellor Changes Mind: U.S. Students Were in Peril*, L.A. Times, Oct. 27, 1983, Pt. I, at 12, col. 1.

92. *After the Invasion: Support Widens on the Hill*, 41 CONG. Q. WEEKLY REP., No. 45, Nov. 12, 1983, at 2361.

93. *Id.* See also Southerland, *Nagging Questions About Grenada*, C.S. Monitor, Nov. 1, 1983, at 1, col. 2.



were reported that day by an ex-U.S. official who left Grenada on October 24.<sup>94</sup>

Granting, however, the validity of the Reagan administration's assertion that the lives of U.S. nationals were endangered and that the situation in Grenada was so chaotic that the military rulers could not have been trusted with their promises,<sup>95</sup> there simply is no justification on humanitarian grounds for the continued presence and activities of U.S. troops in Grenada after the rescue operations were completed during the first few days of the military action.<sup>96</sup>

### *B. Request by the Governor-General of Grenada*

Can the military intervention be justified if the United States and the OECS States took their action in response to a request for assistance from the Governor-General of Grenada, Sir Paul Scoon? In an attempt to answer this question, it is essential to recall the events preceding the invasion.

In his statement prepared for presentation before the House Committee on Foreign Affairs on November 2, 1983, Deputy Secretary of State Kenneth W. Dam stated that "[t]he invitation of lawful governmental authority constitutes a recognized basis under international law for foreign States to provide requested assistance."<sup>97</sup> Dam reported that the United States was informed on October 24 by Prime Minister Adams of Barbados that Grenada's Governor-General, Sir Paul Scoon, "had used a confidential channel to transmit an appeal for action by the OECS and other regional States to restore order on the island."<sup>98</sup> The Deputy Secretary said that this confidential request was not made public until the Governor-General's safety had been assured,<sup>99</sup> and added: "[t]he legal authorities of the Governor-General remained the sole source of governmental legitimacy on the island in the wake of the

94. Smith, *Ex-U.S. Official Cites Ease in Leaving Grenada Day Before Invasion*, N.Y. Times, Oct. 29, 1983, at 9, col. 3.

95. See *id.* at col. 5, for a statement by the White House spokesman, Larry Speakes, who stated, "What they told us, we simply did not trust. There was no way we could be at all assured that their promises would have been kept."

96. See, e.g., Mydans, *supra* note 28; Kleiman, *Parents Wait for Word on Students*, N.Y. Times, Oct. 29, 1983, at 8, col. 1; Clines, *Medical Students Cheer Reagan at a White House Ceremony*, N.Y. Times, Nov. 8, 1983, at 6, col. 1.

97. Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 203 (1984).

98. *Id.*

99. *Id.*

tragic events I have described. We and the OECS countries accorded his appeal exceptional moral and legal weight.”<sup>100</sup> Earlier, on October 25, at his news conference, Secretary Shultz said in response to a question: “[a]s far as the establishment of authority on the island is concerned, we believe that the Governor-General is the logical person, given the fact that there is a vacuum of government there . . . .”<sup>101</sup> Subsequently, Sir Paul confirmed that he had appealed for outside assistance on October 23.<sup>102</sup>

Pertinent facts preceding the invasion include an emergency session of the OECS States on October 21. In President Reagan’s words in his October 25 letter to the Congress,

[t]he meeting took note of the anarchic conditions and the serious violations of human rights and bloodshed that had occurred, and the consequent unprecedented threat to the peace and security of the region created by the vacuum of authority in Grenada. The OECS determined to take immediate, necessary steps to restore order in Grenada so as to protect against further loss of life, pending the restoration of effective governmental institutions. To this end, the OECS formed a collective security force comprising elements from member States to restore order in Grenada and requested the immediate cooperation of a number of friendly countries, including the governments of Barbados, Jamaica and the United States, in these efforts. In response to this call for assistance and in view of the overriding importance of protecting the lives of the United States citizens in Grenada, I have authorized the Armed Forces of the United States to participate along with these other nations in this collective security force.<sup>103</sup>

At his news conference on October 25, Secretary Shultz recounted the various rounds of discussion among U.S. officials from October 21 to October 24 before the decision was made to send the U.S. forces to Grenada.<sup>104</sup> It seems today that any speculation on whether or not the United States and the OECS States would have acted absent the invitation of the Governor-General will be futile.

Assuming, however, that Sir Paul Scoon did seek outside legal assistance before the U.S. decided to intervene,<sup>105</sup> the nature and

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100. *Id.*

101. 83 DEP’T ST. BULL., No. 2081, Dec., 1983, at 71.

102. Interview on BBC-TV, cited in Moore, *Grenada and the International Double Standard*, 78 AM. J. INT’L L. 145, 148 (1984).

103. 83 DEP’T ST. BULL., *supra* note 101, at 68-69.

104. See *id.* at 69-70.

105. See *supra* note 102.

scope of his authority to do so under the constitution of Grenada are still subject to varying interpretations. To illustrate, under the 1973 Grenada Constitution,<sup>106</sup> the executive authority of Grenada, vested in Queen Elizabeth II, could be exercised "on her behalf by the Governor-General, either directly or through officers subordinate to him."<sup>107</sup> The Governor-General was entitled to proclaim a national emergency<sup>108</sup> and exercise the powers of the prime minister if he, "acting in his own deliberate judgment, considers that it is impracticable to obtain the advice of the Prime Minister owing to his absence or illness . . . ."<sup>109</sup>

On October 25, the OECS States said: "[i]t is the intention of the member governments of the OECS that once the threat has been removed, they will invite the Governor-General of Grenada to assume executive authority of the country under the provisions of the Grenada constitution of 1973 . . . ."<sup>110</sup> The 1973 constitution was, however, suspended by the Bishop regime in March 1979, which superseded it with a series of "People's Laws," under which all executive and legislative power was vested in the People's Revolutionary Government.<sup>111</sup> The role of the Governor-General was thenceforth to be primarily ceremonial, and as representative of the Queen, he was to "perform such functions as the People's Revolutionary Government may from time to time advise."<sup>112</sup> His actual powers were limited to the removal from office of a few functionaries.<sup>113</sup>

The assassination of Maurice Bishop and the establishment of the Revolutionary Military Council in Grenada raised several pertinent international law questions. For example, did the new government meet the minimal standards for de facto recognition? Was

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106. THE GRENADA CONSTITUTIONAL ORDER, 1973, No. 2155 (1973) *reprinted in* Blaustein & O'Leary, *Grenada*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (A. Blaustein & G. Flanz eds. 1974) (superseded section).

107. *Id.* art. 57(2).

108. *Id.* art. 17.

109. *Id.* art. 61(2).

110. 83 DEP'T ST. BULL., *supra* note 101, at 68.

111. People's Law No. 2, Mar. 13, 1979, *reprinted in* Blaustein and Holt, *Grenada*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 18 (A. Blaustein and G. Flanz eds. 1983).

112. People's Law No. 3, March 28, 1979, *reprinted in* Blaustein and Holt, *Grenada*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein and G. Flanz eds. 1983) *Id.* at 18.

113. *See* People's Law No. 18, April 2, 1979, *reprinted in* Blaustein and Holt, *Grenada*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein and G. Flanz eds. 1983) at 30. For the three specific functions mentioned, *see id.* at 51, 54 and 58.

the suspended constitution revived because of these events? What was the Governor-General's relationship with the Revolutionary Military Council?

In light of the preceding discussion it is not clear that, in the wake of the breakdown of law and order in Grenada, the Governor-General could on his own initiative invite foreign forces to intervene.

*C. U.S. Action in Support of a Regional Collective Security Arrangement*

The OECS statement of October 25, 1983 recalled the deep concern felt by the member governments over the worsening situation in Grenada after the assassination of Prime Minister Bishop on October 19, and "the extensive military buildup in Grenada over the last few years [which] had created a situation of disproportionate military strength between Grenada and other OECS countries and other neighboring States."<sup>114</sup> The statement added that member governments of the organization had decided to take appropriate action "[u]nder the provisions of Article 8 of the treaty establishing the OECS concerning defence and security in the sub-region."<sup>115</sup> It continued:

Bearing in mind the relative lack of military resources in the possession of the other OECS countries, the member governments have sought assistance for this purpose from friendly countries within the region and subsequently from outside. Three governments have responded to the OECS member governments' requests to form a multinational force for the purpose of undertaking a preemptive defensive strike in order to remove this dangerous threat to peace and security to their subregion and to establish a situation of normalcy in Grenada. These governments are Barbados, Jamaica, and the United States of America. Barbados and Jamaica are members of CARICOM [Caribbean Community], and Barbados is linked to some of the OECS member governments in a subregional security agreement.<sup>116</sup>

At a special meeting of the OAS Permanent Council on October 26, Ambassador Middendorf justified the United States support of the OECS request, calling the action "a reasonable and proportionate reaction to the deterioration of authority in Grenada and

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114. 83 DEP'T ST. BULL., *supra* note 101, at 68.

115. *Id.*

116. *Id.*

the threat this poses to the peace and security of the eastern Caribbean."<sup>117</sup> The Ambassador asserted that the action was "consistent with the purposes and principles of the Charters of the United Nations and the Organization of American States, since it aims at the restoration of conditions of law and order fundamental to the enjoyment of basic human rights, so clearly in jeopardy in Grenada."<sup>118</sup>

A week later, on November 2, Deputy Secretary of State Kenneth Dam similarly argued that it was lawful for the United States to respond to the OECS request, since the OECS action, taken pursuant to the regional security arrangement established under the 1981 Treaty,<sup>119</sup> was an action consistent with the purpose and principles of the United Nations Charter as well as the OAS Charter.<sup>120</sup> In his statement, Dam presented the legal brief for the OECS action:

[The 1981 OECS Treaty] contains a number of provisions, in Articles 3, 4 and 8, which deal with local as well as external threats to peace and security. The appeal of the Governor-General of Grenada for OECS assistance provided a legitimate basis for collective action under the framework of this regional treaty. Both the OAS Charter, in Articles 22 and 28, and the UN Charter, in Article 52, recognize the competence of regional security bodies in ensuring regional peace and stability. Article 22 of the OAS Charter in particular makes clear that action pursuant to a special security treaty in force does not constitute intervention or use of force otherwise prohibited by Articles 18 or 20 of that Charter. The OECS Treaty functions as the regional security arrangement of the OECS countries, none of which is party to the Rio Treaty.<sup>121</sup>

Earlier statements by Secretary Shultz<sup>122</sup> and Ambassador Kirkpatrick<sup>123</sup> used similar language to claim the validity of the OECS action and the U.S. support of such action.

Any attempt at a legal analysis of these claims must be directed initially at clarifying certain conceptual and normative ambiguities, especially those related to: (1) the scope of the applicable

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117. *Id.* at 73.

118. *Id.*

119. Treaty Establishing the Organization of Eastern Caribbean States, June 18, 1981, reprinted in 20 INT'L LEGAL MATERIALS 1166 (1981).

120. See Leich, *supra* note 97, at 203.

121. *Id.* at 203.

122. 83 DEF'T ST. BULL., *supra* note 101, at 70.

123. See *id.* at 74-77.

norms regarding the use of force, especially the UN Charter prohibition, and the pertinent provisions in the OAS Charter<sup>124</sup> and the Rio Treaty;<sup>125</sup> (2) the application of the OECS Treaty provisions in the context of the OAS regional arrangements; (3) the application of the OECS Treaty provisions in the context of the OAS regional arrangements; and (4) the nature of the subregional security agreement between Barbados and some of the OECS member governments, a reference to which was made in the OECS statement of October 25.<sup>126</sup> Since not much information is publicly available on the third issue, the subregional security pact, and since the pact is apparently unregistered, the discussion here will be limited to the other three issues raised, and will precede by the pertinent provisions of the 1981 Treaty, which will provide the essential backdrop for this discussion.

1. *The OECS Treaty Provisions.* Deputy Secretary Dam referred to articles 3, 4, and 8 of the 1981 Treaty, which are concerned with local as well as external threats to peace and security.<sup>127</sup> The OECS statement of October 25<sup>128</sup> and Ambassador Middendorf's statement of October 26<sup>129</sup> specifically referred to article 8 of the Treaty. Article 3 enumerates the major purposes of the organization, which include the defense of the member States' sovereignty, territorial integrity, and independence,<sup>130</sup> and the assistance of the member States "in the realization of their obligations and responsibilities to the international community with due regard to the role of international law as a standard of conduct in their relationship."<sup>131</sup> Consequently, the member States are called upon to coordinate, harmonize, and pursue joint policies in several fields including mutual defense and security.<sup>132</sup> Article 4 obligates member States to take all appropriate measures toward implementation "arising out of this Treaty or resulting from decisions taken by the institutions of the Organization."<sup>133</sup> Article 8 calls upon

124. See *supra* note 81.

125. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838 [hereinafter cited as Rio Treaty].

126. See *supra* note 101, at 67, 68.

127. See *supra* note 120.

128. See *supra* note 101, at 67, 68.

129. See *id.* at 72, 73.

130. See art. 3(b), 20 INT'L LEGAL MATERIALS 1166, 1168 (1981).

131. *Id.* art. 3(c).

132. *Id.* art. 3(2)(q).

133. *Id.*

member States to coordinate their efforts "for collective defense and the preservation of peace and security against external aggression and for the development of close ties among the Member States of the Organization in matters of external defense and security . . . in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations."<sup>134</sup>

Additional pertinent provisions include article 6, which designates the Authority, comprising heads of governments of member States, as the "supreme policy-making institution of the OECS."<sup>135</sup> Article 7, which describes the composition and functions of the Foreign Affairs Committee,<sup>136</sup> and references in articles 6 and 16<sup>137</sup> regarding the participation of nonmembers with the OECS members, are also relevant.

## 2. *Prohibition Against the Use of Force.*

a. *Article 2(4) of the UN Charter.* The UN Charter prohibition against the use of force, contained in article 2(4),<sup>138</sup> marked a dramatic break with the pre-Charter era. Authorized exceptions are specifically enumerated. Article 51 recognizes "the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations." Two other situations qualify as exceptions to this proscription: (1) if the action is taken by the Security Council under Chapter VII of the Charter in order to maintain or restore international peace and security, and (2) if an enforcement action is taken by "regional arrangements or agencies" under article 53 with the authorization of the Security Council.<sup>139</sup> Article 103 incorporates the supremacy clause, establishing that the Charter provisions regarding the obligations of member States shall prevail over any inconsistent treaty.

The divergence of views regarding the nature and scope of the article 2(4) prohibition against the use of force is represented by the

134. *Id.* art. 8(4).

135. *Id.* art. 6(4).

136. *Id.* art. 7.

137. *Id.* arts. 6, 16.

138. Art. 2, para. 4 reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.*

139. The pertinent part of article 53(1) reads: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . ."

assertion by some that this prohibition has become a peremptory norm of international law,<sup>140</sup> and the contention by others that the prohibition is already dead and survives only in the memory of those who cherish it as an unfulfilled dream.<sup>141</sup> The latter would mourn the demise of article 2(4) in light of State conduct, ranging in the recent past from the Iran-Iraq war to several States' conduct in the conflicts in the Falklands, Afghanistan, Bangladesh, Vietnam, Kampuchea, Central America, Uganda, Southern Africa, and the Middle East. Ambassador Kirkpatrick's statement in the Security Council on October 27 represents the broader interpretation of the language contained in article 2(4), to wit, "or in any other manner inconsistent with the purposes of the United Nations," when she said: "[t]he prohibitions against the use of the force in the UN Charter are contextual, not absolute. They provide ample justification for the use of force against force in pursuit of the other values also inscribed in the charter—freedom, democracy, peace. The Charter does not require that peoples submit supinely to terror, nor that their neighbors be indifferent to their terrorization."<sup>142</sup> Thus, according to this view, a State can use armed force in support of the purposes of the United Nations, as enunciated in article 1 of the Charter. Such a broad reading of article 2(4), absent any effective community review of a State's unilateral determination, demonstrates the potential for abuse by States in reliance upon this ambiguity.

*b. Pertinent Provisions of the OAS Charter and the Rio Treaty.* In the OAS Charter, articles 18 and 20 prohibit the use of force, directly or indirectly, on any grounds and for any reason whatever. Two exceptions are pertinent for our discussion. First, article 22 provides that: "[m]easures adopted for the maintenance of peace and security in accordance with existing treaties do not

140. See, e.g., Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 13, where he asserts: "Though writers disagree on the precise definition of *jus cogens*, they do agree generally that the principle of prohibition of the use of force is a prime example of it. Thus, the principle of non-use of force in Article 2.4 and the self-defense exception in case of armed attack in Article 51 are widely considered peremptory norms of international law."

141. See Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970). But see Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971). See also Panel, *Armed Force, Peaceful Settlement, and the United Nations Charter: Are There Alternatives to "A New International Anarchy"?*, 77 PROC. AM. SOC'Y INT'L L. 69 (1983).

142. 83 DEP'T ST. BULL., *supra* note 101, at 74. See also Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 229 (1983).



constitute a violation of the principles set forth in Articles 18 and 20." Second, article 28 provides that:

If the violability or the integrity of the territory or the sovereignty or political independence of any American State would be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extracontinental conflict, or by a conflict between two or more American States, or by any other act or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

Article 3 of the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty)<sup>143</sup> authorizes collective self-defense in the event of an armed attack against an American State, under which the parties undertake "to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." The 1975 Protocol of Amendment to the Rio Treaty,<sup>144</sup> which is not yet in force, limits the application of article 3 to only those situations where the victim of an armed attack is a State party and not just an "American State."

Article 6 of the Rio Treaty provides that:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

In light of the past practices of collective economic actions under article 6, the 1975 Protocol of Amendment to the Rio Treaty added a new article which reads: "Any assistance the Organ of Consultation may decide to furnish a State Party may not be provided without the consent of that State."<sup>145</sup>

143. Rio Treaty, *supra* note 125.

144. Reprinted in I F. GARCIA-AMADOR, *THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS*, Pt. II, at 359-72 (1983).

145. See generally Rowles, *The United States, the OAS, and the Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385, 390-96 (1983).

c. *U.S.-OECS Action as a Self-Defense Measure Under Article 51.* The United States Government did not defend its action in Grenada by invoking article 51. Since the action was not in response to an "armed attack," under a textual interpretation of article 51, the action would not be considered a valid exercise of self-defense. However, the case would be tenuous at best even if the action were to be characterized as a "preemptive defensive strike,"<sup>146</sup> that is, an anticipatory self-defense measure. Even if anticipatory self-defense were to be recognized as a right under a contextual reading of article 51,<sup>147</sup> a claim's validity must be judged by its having met certain prerequisites, usually described in a summary formulation in two terms: necessity and proportionality.

The accepted traditional standard of necessity was enunciated by U.S. Secretary of State Daniel Webster in the often-cited *Caroline* case.<sup>148</sup> In that incident, which involved the destruction of the American steamer *The Caroline* in 1842 by British forces, Webster suggested that the necessity of self-defense has to be "instant, overwhelming, and leaving no choice of means and no moment for deliberation, and must be limited by that necessity and kept clearly within it."<sup>149</sup> No matter how anarchic the situation in Grenada was during the last few days before the military action, the case has not been made that the necessity for the action was instant and overwhelming and had left "no choice of means and no moment for deliberation."

Granting, however, the merit of the criticism by Professors McDougal and Feliciano of the standard of necessity as enunciated in the *Caroline* case, that it is "so abstractly restrictive as almost, if read literally, to impose paralysis,"<sup>150</sup> and accepting the standard of "reasonableness in particular context" to determine the validity of the use of force, there still remain serious questions about the existence of such necessity.

146. 83 DEP'T ST. BULL., *supra* note 101, at 67, 68.

147. Mallison & Mallison, *The Israel Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417, 420; "The negotiating history at the San Francisco conference reveals that article 51 was intended to incorporate the entire customary law or 'inherent right' of self-defense. The comprehensive incorporation of the customary law includes reasonable and necessary anticipatory self-defense since this has always been a part of the customary law. This negotiating history governs the meaning of the article in any of the five official languages of the Charter."

148. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409 (1906).

149. *Id.* at 412.

150. M. McDUGAL & F. FELICIANO, *supra* note 86, at 217. For an incisive analysis, see generally *id.* at 217-60.

Proportionality connotes "the amount of coercion reasonably necessary in a particular instance for achieving the lawful purpose of self-defense."<sup>151</sup> Again, the case has not been made that the situation in Grenada warranted the degree of intensity and scope of the use of force as employed by the United States.

In light of these prohibitions against the use of force, the essential question therefore is whether the OECS action is a regional peacekeeping action consistent with the purposes and principles of the United Nations and thereby authorized as valid under article 52 of the UN Charter.

3. *U.S.-OECS Intervention as a Regional Peacekeeping Action.* Granting that the military intervention was not an enforcement action under article 53,<sup>152</sup> its validity has to be judged by examining whether the action was valid as a regional peacekeeping action under article 52. Supporters of the collective security action would perhaps argue, as did Secretary Shultz at his news conference on October 25, that the OECS States were not members of the Rio Treaty, and consequently they were bound not by the Rio Treaty but by their own security arrangement, the OECS Treaty.<sup>153</sup> Ambassador Middendorf asserted that the U.S.-OECS collective security action was valid under article 52 of the UN Charter and consistent with articles 22 and 28 of the OAS Charter.<sup>154</sup> Also, it has been argued that the action's consistency under the latter articles is not required, for pursuant to article 137 of the OAS Charter, "[n]one of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations."<sup>155</sup>

Under article 52(1), the establishment of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action," and which are consistent with the purposes and principles of the United Nations, is authorized. Thus, the OECS arrangement would qualify as a regional security arrange-

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151. *Id.* at 243. See also Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253, 306-311 (1977).

152. On enforcement action by regional agencies, see Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175 (1967).

153. 83 DEP'T ST. BULL., *supra* note 101, at 69, 70.

154. *Id.* at 72, 73.

155. Moore, *supra* note 102, at 158.

ment or agency. However, article 52(2) mandates that members constituting such arrangements "shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

The OECS States failed to meet the article 52(2) requirement, for the record does not indicate that they made any effort, much less "every effort," in search of "pacific settlement of local disputes." Even granting that on October 23, when the OECS members requested outside military assistance for intervention, there was a reasonable basis for their perception that there existed "anarchic conditions, the serious violation of human rights and bloodshed . . . and the consequent unprecedented threat to the peace and security of the region created by the vacuum of authority in Grenada,"<sup>156</sup> the fact remains that no efforts were made by any State intervening in Grenada to resort to any "pacific means of settlement" of disputes.<sup>157</sup>

A literal reading of articles 22 and 28 of the OAS Charter would support the argument that the OECS action was consistent with these provisions. However, as an American Bar Association Committee investigating the legal aspects of the OECS action has observed, the legislative history of the OAS Charter "refutes any suggestion of an intent to allow parties to the OAS Charter to take part in collective security arrangements within the [Western] hemisphere (including the Caribbean) outside the OAS system."<sup>158</sup> The Committee adds that "[at] no point in the discussion was the suggestion made that substituting 'existing treaties' and 'special treaties on the subject' for 'Rio Treaty' opened the door for the parties to the OAS Charter to engage in a parallel system of collective security in the hemisphere."<sup>159</sup>

Finally, as in this case, if a military action by any group of two or more States purporting to act as a regional arrangement under

156. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 541, *THE DECISION TO ASSIST GRENADA* (1984) (cited in a statement by Langhorne A. Motley, Assistant Secretary for Inter-American Affairs, before the House Armed Services Committee on Jan. 24, 1984).

157. Member States of the United Nations have assumed that obligation pursuant to art. 2(3) and Chap. VI (arts. 33-38) of the U.N. Charter.

158. American Bar Association Section of International Law and Practice, *Report of the Committee on Grenada* 69-70 (Feb. 10, 1984). Four distinguished international lawyers were committee members—Edward Gordon, as Chairman; and Richard B. Bilder, Arthur W. Rovine and Don Wallace, Jr., as members.

159. *Id.* at 70.

article 52, could be considered valid by reference simply to their own constitutive instrument without any broader community review of such action, as mandated in article 53, it can be persuasively argued that such a construction of article 52 would defeat the intentions and policies underlying the proscriptions on the use of force as contained in article 2(4) of the UN Charter and articles 20 and 22 of the OAS Charter.<sup>160</sup>

#### IV. APPRAISAL AND RECOMMENDATION

The long-range impact on world public order of the U.S.-led invasion in Grenada is not to be measured by popular responses, no matter how enthusiastic, in the United States, Grenada, or for that matter anywhere else. When an action of this kind is undertaken by a super-power, and the legal bases for this action are at best tenuous, a further weakening of the few existing constraints on the use of force is especially likely to occur.

Notwithstanding the presence of normative ambiguities in the article 2(4) prohibition against the use of force and the absence of adequate and effective institutional arrangements to regulate unauthorized use of force, the judgment of the world community on such issues provides a powerful signal, and that signal was unambiguously given in the UN Security Council and General Assembly resolutions on the subject.<sup>161</sup>

When the United States justifies its action by reliance on the provisions of the OECS Treaty and by the invocation of article 52 of the UN Charter, while ignoring the obligations it has undertaken under the OAS Charter and the Rio Treaty, it adversely affects the already fragile world order both by its utterances and its conduct.<sup>162</sup> It is imperative that the U.S. decisionmakers demonstrate

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160. For an insightful analysis, see *id.* at 33-71. For a response to the Report, see Letter, dated February 10, 1984, from Davis R. Robinson, Legal Adviser to the Department of State, to Edward Gordon, Chairman of the Committee on Grenada of the A.B.A.'s Section on International Law and Practice, 3-5 [hereinafter cited as the Legal Adviser's Letter] (A copy of the letter is on file at the office of the CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL).

161. See *supra* notes 42 and 46 and accompanying text. Asked about the UN General Assembly vote condemning the U.S. action, President Reagan responded in a press briefing: "One hundred nations in the United Nations have not agreed with us on just about everything that has come before us where we're involved, and it didn't upset my breakfast at all." See *Denver Post*, Nov. 4, 1984, at 1, cols. 1,4.

162. But see The Legal Adviser's Letter, *supra* note 160, at 7. "[The Legal Adviser's] office is acutely conscious of the effect that U.S. legal positions may have on the development of international legal restraints on the use of force." See also *id.* at 5. "We share the concern

by their actions that they are committed to strengthening the rule of law in the international arena. For this to be accomplished, legal norms have to guide action instead of their being used as a rationale to justify expedient political decisions already made.

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of the [A.B.A.'s Section on International Law and Practice] that the legal position adopted by the United States in connection with the collective security action on Grenada not be considered as standing for the proposition that international legal restraints on the use of force have been eroding. We do not believe that it can properly be so construed."